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**The Right of Displaced Persons to Property and to Return Home after *Demopoulos*.**

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# *The Right of Displaced Persons to Property and to Return Home after* **Demopoulos**

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## Abstract

This article considers the rights of those displaced by armed conflict to their property and to return home under general international law in light of *Demopoulos* and its impact on subsequent cases. The European Court of Human Rights dismissed the case as inadmissible on the ground that the Immovable Property Commission (IPC) established by the Turkish Republic of Northern Cyprus was an effective domestic remedy which should have been exhausted first. Significantly, the Court concluded that the lapse of significant time and the political nature of a dispute should influence its decision whilst property restitution is not the only available remedy to those displaced. This article takes a critical stance on these conclusions. In doing so it emphasises the significance of property restitution and to return home and argues that the decision, as evident from post-*Demopoulos* developments, fundamentally undermines the established rights of the displaced giving primacy to political realism.

## Keywords

Property, restitution, displacement, *Demopoulos*, home, armed conflict

## 1. Introduction

Forcible displacement because of armed conflict continues to constitute a human rights problem of significant proportions.[1] Such civilian uprooting has serious implications for the displaced population. Displacement in this context is associated with deprivation of fundamental rights including the rights to property and to home and freedom of movement and settlement in one's own country. It may also amount to a war crime and a crime against humanity under certain circumstances.[2] Hence, displaced persons, irrespective of whether they have crossed an international border, require the effective protection of international law.

This article critically assesses the conclusions of the European Court of Human Rights (ECtHR) in *Demopoulos*.[3] Indeed, the decision raises broader questions relating to the rights of the displaced affected by armed conflict and foreign occupation, particularly their right to property and to return home.[4] With continuing conflict worldwide, it is essential to see how contemporary international law responds to such challenges and what safeguards are in place for their protection. It is also important to see how the

[1] Recent statistics estimate those displaced irrespective of cause at 27 million, excluding refugees. United Nations High Commissioner for Refugees, 'On the Run in Their Own Land', available at: www.unhcr.org/pages/49c3646c146.html [last accessed 31 March 2014].

[2] On consequences of displacement see The Office of the United Nations Commissioner for Refugees, *The State of the World's Refugees: Human Displacement in the New Millennium* (Oxford: Oxford University Press, 2006) at 155-56.

[3] *Demopoulos and others* v *Turkey* (2010); 50 EHRR SE14 at [9]. For critical review Loucaides, 'Is the European Court of Human Rights Still a Principled Court of Human Rights After the *Demopoulos* Case?', (2011) 24 *Leiden Journal of International Law* at 435-465; Polyviou and Arakelian, *Fall of the Guardians: The European Court of Human Rights and the Case of* Demopoulos (Nicosia: University of Nicosia Press, 2011).

[4] This article does not consider those displaced due to natural disasters.

ECtHR approached these challenges, and how the rights of the displaced have been affected as a result of the court's conclusions.

*Demopoulos* concerned a claim brought by Greek-Cypriots against Turkey for violation of peaceful enjoyment of their property safeguarded under article 1 Protocol 1 (P1-1) of the European Convention on Human Rights (ECHR). They also complained of violation of their right to home protected under article 8 ECHR. According to the applicants, such violations resulted from Turkey's occupation of Cyprus since 1974. The ECtHR dismissed the applications on the ground that the applicants had not exhausted the domestic remedies provided under 'law 67/2005' adopted by the self-declared 'Turkish Republic of Northern Cyprus' (TRNC).[5] Under this law, individuals should refer their claims to the 'Immovable Property Commission' (IPC).

Whilst *Demopoulos* continues to recognise Turkey as responsible for the situation in Cyprus, which remains a problem of occupation,[6] it prevents Greek-Cypriots from resorting to the ECtHR and denies them the right to restitution and to return home. In theory, displaced Greek-Cypriots could still turn - and indeed some have turned[7] - to the ECtHR after having exhausted the remedy under consideration. Is however such remedy truly effective as the ECtHR concluded? This article challenges this and argues that the decision in *Demopoulos* has serious legal repercussions on the exercise as well as on the substance of the rights of the displaced.

This article examines *Demopoulos* in light of the international legal framework relating to the protection of displaced persons. It takes a critical stance on the ECtHR's conclusions and argues that the rights of the displaced to property and to return home are well-rooted under human rights and humanitarian law and the law on state responsibility. It challenges the ECtHR's references to political realism and it analyses the reasons that make the remedy before the IPC ineffective. This is further achieved by reference to subsequent judicial developments such as *Meleagrou* and to information obtained by individuals who have resorted to the IPC for a remedy. The discussion then focuses on states which did not put in place extensive restitution programmes and nevertheless achieved peace, with analysis of the reasons why Cyprus needs to be differentiated from these. The article finally concludes that property restitution and the right to return home are essential requirements for the restoration of the international legal order, human rights and the rule of law.

The analysis starts with a brief background of the leading cases relating to the Cyprus conflict. Such enquiry is essential in order to comprehend the legal context of *Demopoulos.*

## 2. The Cyprus–Turkey Conflict before the European Court of Human Rights

On 22 July 1989, Titina Loizidou, a displaced Greek-Cypriot, lodged a complaint against Turkey before the European Commission on Human Rights (ECommHR) for violation, among others, of P1-1. Loizidou complained that as a result of the Turkish occupation of

[5] *Demopoulos,* supra n 3; 'Law for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution, as amended by Law nos. 59/2006 and 85/2007'.
[6] *Demopoulos,* ibid, at [114].
[7] I.e. *Meleagrou et al v Turkey* Application No 14434/09, Decision, 2 April 2013.

Cyprus she had been prevented from peaceful enjoyment of her possessions.[8] The case was referred to the ECtHR which held that Turkey was solely responsible for TRNC acts and that the violations had a continuing character. Mindful of the fact that the ECHR must not be read in isolation of other rules of international law, including those prohibiting armed force, the ECtHR concluded that the applicant had not validly lost title over her property.[9] It further found that Turkey's acts constituted a total and continuous denial of access and purported expropriation without compensation. This was in breach of P1-1.[10]

The ECtHR, taking into consideration the TRNC's unlawful character, refused to 'attribute legal validity' to provisions interfering with property rights. Nevertheless, it considered it neither desirable nor necessary 'to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC".'[11]

The judgment in *Loizidou* is significant in many respects, particularly relating to the responsibility of occupying forces for human rights violations in territories under their control. Even more so, it constitutes a landmark decision in ECtHR jurisprudence on the property rights of the displaced. The extent to which, however, later rulings are consistent with the conclusions in *Loizidou* is discussed below.

Importantly however, *Loizidou* opened the way to more individual applications. It was followed by *Demades* where the ECtHR concluded that Turkey's actions infringed not only the applicant's right to property, but also his right to have access to and use his home. Furthermore, the ECtHR refused to consider whether the Law on Compensation for Immovable Properties Located within the Boundaries of the TRNC adopted by Turkey in 2003 constituted an effective domestic remedy. This was because it was given effect after the hearing on admissibility.[12]

Turkey's attempt to prevent further applications reaching the ECtHR, however, did not come as a surprise. This was particularly so after the conclusion in *Cyprus* v *Turkey* that remedies of *de facto* authorities such as the TRNC could be regarded as domestic remedies, in deviation from *Loizidou*. Yet again, the ECtHR concluded that due to property restrictions imposed by the TRNC Constitution resort to its courts did not provide an effective remedy.[13]

Challenged by the wave of similar claims, the ECtHR took a further step of limiting individual access in *Xenides-Arestis.*[14] According to its ruling, 'the Court cannot ignore the fact that there are already approximately 1,400 property cases pending before the court brought primarily by Greek-Cypriots against Turkey.'[15] Having initially concluded that the remedy under the 2003 law is not effective,[16] it called on Turkey to introduce a remedy 'which secures genuinely effective redress for the Convention violations' in this

[8] *Loizidou* v *Turkey* (1997); 23 EHRR 513.
[9] Ibid, at [43] and [46]. On TRNC illegality see United Nations SC Res 541, 18 November 1983, S/RES/541 (1983) and SC Res 550, 11 May 1984, S/RES/544 (1983) (1984).
[10] *Loizidou*, ibid, at [63]; *Cyprus* v *Turkey* (2002); 35 EHRR 30 at [187].
[11] *Loizidou*, ibid, at [44] – [45].
[12] *Demades* v *Turkey* Application No 16219/90, Merits and Just Satisfaction, 31 July 2003 at [20].
[13] *Cyprus* v *Turkey*, supra n 10 at [184].
[14] *Xenides-Arestis* v *Turkey* (2011); 52 EHRR 16.
[15] Ibid, at [38].
[16] *Xenides-Arestis* v *Turkey* Application No 46347/99, Admissibility, 14 March 2005.

and similar cases.[17] It did so by reference to article 46 ECHR which requires compliance with the Court's judgments. Whilst stressing that states parties are free to choose the means by which they will comply with their obligations, the court conditioned this on the compatibility of such means with its conclusions in these judgments.[18] In view of this, it ordered postponement of all similar claims until such remedy was introduced.[19]

Following this, Turkey adopted the Law for the Compensation, Exchange and Restitution of Immovable Properties (law 67/2005) by which it established the IPC. The role of the IPC is to consider Greek-Cypriot property claims. However, in deciding the question of just satisfaction in *Xenides-Aresti*, the ECtHR rejected Turkey's claim that the applicant should, at that stage of the proceedings and after it had made a judgment on the merits, resort to the IPC.[20] Nevertheless, the Court welcomed the steps taken by Turkey.

In exercising its functions the IPC is empowered to decide the applicable means of redress in each instance, namely restitution, exchange of properties or compensation. A right of appeal is further provided before the TRNC High Administrative Court. The extent, however, to which this process satisfies international legal standards, including effectiveness, falls at the centre of the analysis that follows.

It is within this context that *Demopoulos* should be understood. In deciding that the IPC procedure was effective, the court declared the applications as inadmissible for failure to exhaust domestic remedies. Importantly, *Demopoulos* deviates from established ECtHR jurisprudence on the impact of unlawful occupation on the rights of legitimate property owners. It undermines the significance of restitution in the Cyprus context in an arbitrary manner[21] and it unjustifiably qualifies the right of the displaced to return home. In doing so, it closes the door to international justice even to those who do turn to the IPC, as the recent inadmissibility decision in *Meleagrou* demonstrates.[22] This latest judicial development is illuminating as to why the findings in *Demopoulos* need to be re-visited to re-instate procedural and substantive justice and the rule of law.[23]

Before however turning to an in-depth discussion of *Demopoulos* and its impact on the rights of the displaced in Cyprus, it is first necessary to see what conclusions can be drawn from other transitional cases before the ECtHR concerning property-related rights.

## 3. Transitional justice and the jurisprudence of the European Court of Human Rights on the rights of the dispossessed

Whilst the ECHR does not incorporate a right to acquire property, the peaceful enjoyment of possessions is safeguarded under P1-1. This protects against arbitrary deprivation except in the public interest and in accordance with the law and the general principles of international law. However, as evident from the non-retroactive character of the ECHR and its Protocols, this provision was not intended to remedy past injustices such as for

[17] *Xenides-Arestis*, supra n 14 at [40].
[18] Ibid, at [39]
[19] Ibid, at [50].
[20] *Xenides-Arestis* v *Turkey* (2007); 44 EHRR SE13 at [37].
[21] Contrast *Demopoulos* and *Meleagrou* with *Dzhurayev v Russia* (2013); 57 EHRR 22 at [248].
[22] Supra n 7.
[23] Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 176 at 186.

instance deprivation of property that occurred during World War II (WWII).[24] This by itself casts doubt as to the ECHR's role in achieving transitional justice.[25]

To this effect, P1-1 is construed in a way that furthers states' economic and social agendas and amidst a lack of consensus on social and economic rights.[26]

The jurisprudence of the ECtHR on property-related matters reveals two main judicial trends. The first places the emphasis on the continuing rights of the initial owner and on strengthening the rule of law by rectifying past injustices.[27] The second trend places the emphasis on the rights of the current owner as imperative for economic stability, particularly for third parties who acquired such property in good faith.[28] Justice, according to this view, is achieved through the establishment of institutions such as the ECtHR which is sufficient to prevent repetition of the violations and to bring 'closure.'[29] In both situations, the rule of law is understood to be satisfied in conflicting ways.

The ECtHR, in an effort to retain the *status quo* and economic stability, has generally rejected on jurisdictional grounds claims concerning property that was taken during anomalous situations.[30] Examples are those that emerged during communist regimes and the conflict in the former Yugoslavia.

The judgment in *Blecic* is quite revealing.[31] The applicant was a Croatian citizen living in Zadar whose specially protected tenancy was terminated because her flat remained unoccupied for longer than six months. The decision was based on laws adopted at the time aimed at preventing the return of people from other ethnicities such as in this instance. The courts did not accept war as justification for such absence.[32] The ECtHR rejected the case on lack of temporal jurisdiction. Emphasis was placed on the time of the interference and not the time of refusal to provide a remedy to that interference.[33] Blecic was deprived of her property with the Supreme Court's decision of February 1996 and before Croatia's ratification of the ECHR in 1997. With the Supreme Court's decision the deprivation became *res judicata.* As the ECtHR questionably concluded, deprivation – as opposed to interference with peaceful enjoyment of possessions - was an instantaneous act and not of a continuing character.[34]

In the German cases brought after reunification the ECtHR was also reluctant to recognise the initial owner's property rights where expropriation materialized before ratification of Protocol 1. Whilst property restitution was the primary objective of

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[24] Allen, 'Restitution and Transitional Justice in the European Court of Human Rights', (2006-07) 13 *Columbia Journal of European Law* 1 at 8-9.

[25] Ibid, at 8; Macklem, 'Rybna 9, Praha 1: Restitution and Memory in International Human Rights Law', (2005) 16 *European Journal of International Law* 1 at 23.

[26] Allen, ibid, at 8-9.

[27] Ibid, at 5-6.

[28] Allen and Douglas, 'Closing the Door on Restitution: the European Court of Human Rights', in Buyse and Hamilton (eds), *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge: Cambridge University Press, 2011) 208 at 210.

[29] Ibid, at 212.

[30] Ibid.

[31] *Blecic* v *Croatia* (2006); 43 EHRR 48.

[32] Lamont, 'Confronting the Consequences of Authoritarianism and Conflict: The ECHR and Transition Rights', in Buyse and Hamilton, supra n 28 81 at 89.

[33] *Blecic*, supra n 31 at [77], [79] and [81].

[34] Ibid, at [85] and [86]; Buyse, *Post-Conflict Housing Restitution: The European human rights perspective, with a case study on Bosnia and Herzegovina* (Mortsel (Antwerpen): Intersentia, 2008) at 240.

reunification,[35] it was precluded for property expropriated during the period of Soviet occupation (1945-49).[36] The different treatment was challenged before German courts and the ECtHR.[37] Both courts concluded that the Federal Republic of Germany (FRG) held no responsibility for property-related violations committed either by the former Soviet Union or the German Democratic Republic (GDR).[38] Moreover, in *Weidlich and others* the ECommHR dismissed the case as inadmissible as the expropriations were carried out before the entry into force of the ECHR.[39] However, whilst the ECtHR could not examine questions of liability for the pre-unification expropriations, it considered whether the applicants had a legitimate expectation as a result of the 1990 Joint Declaration.[40] It held that the German government enjoyed a wide margin of appreciation in relation to indemnification and restitution for violations carried out by another power.[41]

The German cases, as also explained in Section 9, need to be distinguished from the Greek-Cypriot cases before the ECtHR. This is because the German expropriations took place well before the coming into force of the ECHR whereas the interferences with Greek-Cypriot property occurred after the adoption of the ECHR and have a continuing character.[42] Significantly however, in the latter cases Turkey, as a foreign occupying power, is accountable for such interferences, whereas the FRG was not since it had no control over the territory and acts under consideration. Turkey's acts in relation to the property of the displaced are tantamount to theft,[43] which makes restitution an imperative objective.

Whilst the ECtHR has been reluctant to invalidate expropriations as seen in the cases above, *Loizidou* signified a major turning point. It stood as an exception whereby the ECtHR held that the fact that the applicant had been denied access to her property was an aggravating factor.[44] Significantly, the unlawful character of the denial of access to property and the fact that the title to the property had not been lost led the ECtHR to

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[35] Article 41, Treaty of 31 August 1990 between the FRG and the GDR on the establishment of German Unity (Unification Treaty); article 1, Treaty of 18 May 1990 between the FRG and the GDR on the Creation of an Economic, Currency and Social Union; Law on the Regulation of Open Property Issues of 23 September 1990; 'Restitution before compensation'. German History in Documents and Images, Vol. 10: One Germany in Europe, 1989-2009, available at: http://germanhistorydocs.ghi-dc.org/pdf/eng/Chapter3_Doc_1English.pdf [last accessed 31 March 2014]; Heslop and Roberto, 'Property Rights in the Unified Germany: a Constitutional, Comparative and International Legal Perspective', (1993) 11 *Boston University International Law Journal* 243 at 259.

[36] Joint Declaration on the Settlement of Open Property Questions, June 15, 1990; *Jahn and others* v *Germany* (2006); 42 EHRR 49.

[37] Judgment, April 23, 1991, 1 BvR 1170/90; 1 BvR 1174/90; 1 BvR 1175/90. Also Heslop and Roberto, supra n 35 at 264-66; Buxbaum, 'The von Maltzan Case: Property Rights after Three Generations', in Berger et al (eds), *Zivil- und Wirtschaftsrecht im Europaischen und Globalen Kontext Private and Commercial Law in a European and Global Context* (Berlin: De Gruyter Recht, 2006) at 295.

[38] *Weidlich et al* v *Germany* (1996); 22 EHRR CD55; *Von Maltzan and others* v *Germany* (2006); 42 EHRR SE11 at [111].

[39] *Weidlich et al*, ibid.

[40] Joint Declaration, supra n 36.

[41] *Von Maltzan and others*, supra n 38 at [111].

[42] Loucaides, 'The Protection of the Right to Property in Occupied Territories', (2004) 53 *International and Comparative Law Quarterly* 677 at 688; Allen, supra n 24 at 24.

[43] See Heslop and Roberto, supra n 35 at 267-268.

[44] Allen, supra n 24 at 14, 15-6, 18-9 and 22.

conclude that the violation was of a continuing character.[45] In this regard, the Greek-Cypriot cases up to *Demopoulos* were the 'only set of cases' where the ECtHR refused to recognise a 'law' that gave effect to the taking of property.[46]

In narrowly construing international rules relating to temporal jurisdiction in transitional cases, the ECtHR refused to accept that the effects of discriminatory restitution laws had a continuing character, an approach followed by the Human Rights Committee (HRC).[47] In particular, the HRC held that confiscation of private property or failure to provide restitution or compensation on discriminatory grounds breached article 26 of the International Covenant on Civil and Political Rights (ICCPR).[48]

By dismissing property claims on grounds of inadmissibility or lack of jurisdiction the ECtHR prevents access of victims to justice.[49] Arguably, its fundamental role in protecting human rights and establishing a European public order could justify deviation from strict adherence to temporal jurisdiction.[50]

In trying to understand why the ECtHR has taken this approach, Judge Jambrek's dissenting opinion in *Loizidou* may shed some light. According to him, the ECtHR is not the forum where cases relating to transitional justice may be settled. For him, courts 'are ill-equipped to deal with large-scale and complex issues which as a rule call for normative action and legal reform.'[51]

An examination of the ECtHR's jurisprudence on property claims in transitional cases therefore reveals lack of clarity, refusal to give due consideration to the circumstances under which the property was lost, but also concern over retaining stability and the *status quo*.[52] As discussed above, the ECtHR accepts that property rights which have long been extinguished cannot be revived and on the basis of lack of jurisdiction it rejects them. As noted, 'it is clear that there is doubt that the "ordinary" principles of justice and human rights are relevant in the transitional context' and that 'the resolution of old disputes is not within [the Court's] domain.'[53]

*Demopoulos*, in clear deviation from *Loizidou* is another confirmation of the ECtHR's unwillingness to deal with massive and widespread human rights violations. The next section sets out the findings of the ECtHR and the legal basis on which it relied for its decision. This is followed by a critical analysis of the court's conclusions as well as an assessment of the reasons why, in the author's view, *Demopoulos* sets a significant setback to the rights of the displaced.

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[45] Ibid, at 17.
[46] Ibid, at 13.
[47] Established under the International Covenant on Civil and Political Rights, 999 *UNTS*, 171 and 1057 *UNTS*, 407.
[48] I.e. *Simunek, Hastings, Tuzilova and Prochazka* v *The Czech Republic* (516/1992) CCPR/C/54/D/516/1992 (1995), [11.6].
[49] Allen and Douglas, supra n 28.
[50] Ibid, at 230.
[51] *Loizidou*, supra n 8; Allen, supra n 24.
[52] Allen and Douglas, supra n 28 at 227 and 232.
[53] Ibid, at 220.

## 4. The Findings in *Demopoulos*

The main argument of the parties in *Demopoulos* was whether the remedy under the IPC should have first been used before resort to the ECtHR. On the one hand, Turkey argued that a finding in support of the legal validity and effectiveness of such remedy was inescapable, as this was set up in compliance with the decision in *Xenides-Aresti.*[54] On the other hand, the applicants challenged the legal basis and competence of the IPC to provide effective remedies.[55]

The ECtHR dismissed the applications for failure to exhaust the available remedies, a rule well established in international law and further stipulated in article 35 ECHR. This provision aims to entrust domestic courts with the main responsibility over human rights complaints allowing only a subsidiary and complementary role to the ECtHR.[56] The court does not aim to assume the role of national authorities which are better placed to know the facts and to take action to redress a violation.[57] States should also be allowed the opportunity to correct the wrongfulness of their acts. This enables only those cases which cannot be adequately resolved domestically to be considered at the European level. The significance of the rule is evident due to the practical difficulties the ECtHR is experiencing in addressing all individual complaints before it. This is particularly true today with its expanded territorial jurisdiction which has overburdened an already under-resourced court.[58] These practical difficulties are central in the ECtHR's conclusions in *Demopoulos* according to which

> The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation[59].

Similarly, the court rejected the applicants' claim that pilot judgments should not extend to the Cypriot property cases because Turkey had failed to comply with previous rulings.[60] This procedure aims to identify persistent systemic problems of serious human rights violations and their source. It enables states to strengthen their internal mechanisms and, in doing so, to limit the number of cases that reach Strasbourg such as in *Demopoulos*.[61] In this particular instance, the ECtHR concluded that the procedure is not

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[54] *Demopoulos,* supra n 3 at [55].
[55] Ibid, at [58]-[62].
[56] Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', (2008) 19 No. 1 *European Journal of International Law* 125 at 128.
[57] Ibid, at 142.
[58] Sadurski, 'Partnering with Strasbourg: Constitutionalism of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', (2009) 9 No. 3 *Human Rights Law Review* 397 at 401 and 406.
[59] *Demopoulos,* supra n 3 at [69].
[60] Ibid, at [81].
[61] The procedure deals with systemic widespread serious human rights violations. Council of Europe Committee of Ministers, Judgments revealing an underlying systemic problem, 12 May 2004, Resolution (2004) 3, available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=743257&Site=COE [last accessed: 31March 2014]; Sadurski, supra n 58 at 414; Helfer, supra n 56 at 142.

conditional upon the state's conduct. Rather, what seemed to be important was the consideration of 'a series of repetitive or clone cases'.[62]

Disassociating the question of remedies from the question of recognition, the ECtHR stressed that the existence of illegal occupation does not render all acts of a *de facto* authority invalid.[63] Relying on the International Court of Justice's (ICJ) Advisory Opinion on *Namibia*,[64] it held that Turkey was responsible for TRNC acts and that it was obliged to take steps to comply with its ECHR obligations in northern Cyprus. To this effect the ECtHR felt compelled to accept the validity of civil, administrative or criminal law measures.[65] Concerned not to create a vacuum for those within or outside the jurisdiction of an occupying power and whose rights are affected, the ECtHR emphasised that 'allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimisation of a regime unlawful under international law.'[66] This further led the ECtHR to conclude that the remedy introduced by Turkey was sufficient to eliminate the administrative practice complained of by the applicants.[67]

Concluding that the IPC was a domestic remedy and that the rule of exhaustion applied, the ECtHR then turned to the applicants' complaint that the IPC was not an effective remedy as restitution was not safeguarded. Here the ECtHR makes a number of conclusions which in the author's view raise significant legal questions.

First, taking into consideration that over the course of the years property had often changed hands the ECtHR pointed out that 'The issue arises to what extent the notion of legal title, and the expectation of enjoying the full benefits of that title, is realistic in practice.'[68] Significantly, recognizing that the state has wide discretion as to what measures it will implement to comply with its ECHR obligations, the ECtHR concluded that the form of remedy is determined by the strength of the connection between legal title and possession and that in effect the passage of time severed this relationship.[69] Moreover, property is 'a material commodity' which can be compensated or exchanged. Whilst acknowledging that the ECHR could not be interpreted in isolation of other rules of general international law, the ECtHR stressed that it was primarily a human rights body. Subsequent to this, individual applications 'cannot be used as a vehicle for the vindication of sovereign rights or findings of breaches of international law between Contracting States.'[70] Importantly, the ECtHR concluded that it would be 'arbitrary and injudicious' to demand restitution, 'even with the aim of vindicating the rights of victims of violations of the Convention',[71] where to do this would involve the eviction of men, women and children.

Finally, whilst recognizing that the procedure before the IPC did not incorporate claims relating to violations of the right to home, the ECtHR concluded that such

[62] *Demopoulos*, supra n 3 at [81].
[63] Ibid, at [89] and [94].
[64] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* Advisory Opinion, ICJ Reports 1971, 16.
[65] *Demopoulos*, supra n 3 at [95].
[66] Ibid, at [96].
[67] Ibid, at [91].
[68] Ibid, at [111].
[69] Ibid, at [113].
[70] Ibid, at [116].
[71] Ibid, at [116].

violation could be covered as part of non-pecuniary damages. This was so despite the fact that in order to submit a claim before the IPC it was necessary to hold title, leaving unprotected other categories of persons whose right to home had been infringed.[72]

Having considered the findings and legal justifications of the ECtHR in *Demopoulos*, it is now time to critically assess some of the main conclusions of the court which in the author's view contradict legal principles and have an adverse impact on the rights of the displaced as protected under general international law.

## 5. The Impact of Political Considerations and Time on the Rights of the Displaced

Displaced persons are frequently caught in prolonged unsuccessful political negotiations leaving them in a legal limbo. What are their rights then if, due to ongoing disagreement, there is no prospect for a speedy resolution? Do the political nature of a dispute and the passage of time have, or should they have, any impact on human rights determinations? This section considers these issues in the light of *Demopoulos* and the ECtHR's references to the plan for the settlement of the Cyprus problem (Annan plan).[73] Whilst the latter will not be discussed in detail some reference is relevant. This is to the extent that it demonstrates how political considerations may have influenced in this instance legal outcomes in relation to the fundamental rights of the displaced.

It is true that the Cyprus dispute has been on the agenda of international fora for more than five decades. As a result of the continuing division of the island the Greek and Turkish-Cypriot communities have been prevented from enjoying a common peaceful European future based on the rule of law, democracy and fundamental rights. International players such as the UN and the Council of Europe feel that it is time to find a long-lasting settlement to the dispute which remains in its current form an anomaly in the international legal system. It is perhaps with these considerations in mind that the ECtHR referred to the prolonged negotiations and the political nature of the dispute with its practical consequences on all those affected by it.

Nevertheless, inter-communal discussions cannot be used as justification for ECHR violations.[74] This is even more so since the Annan plan never came into force as a result of the Greek-Cypriots' exercise of their right to self-determination.[75]

Importantly, the Annan plan was widely perceived as not effectively safeguarding fundamental rights including the rights to property and home and freedom of movement and settlement.[76] For instance, only up to 18% of those displaced would be able to return in a period of 19 years after the plan's adoption.[77] The plan imposed permanent and

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[72] Ibid, at [136].

[73] The plan was prepared by former United Nations Secretary General Mr Kofi Annan. The Comprehensive Settlement of the Cyprus Problem, 31 March 2004.

[74] *Cyprus v Turkey*, supra n 10 at [174]; *Xenides-Arestis*, supra n 14 at [27].

[75] On the *erga omnes* effect of self-determination, *East Timor (Portugal* v *Australia)*, Judgment, ICJ Reports 1995 90 at [29].

[76] For analysis, Palley, *An International Relations Debacle: The UN Secretary-General's Mission of Good Offices in Cyprus, 1999-2004* (Oxford: Hart, 2005); International Expert Panel Convened by the Committee for a European Solution in Cyprus, 'A principled basis for a just and lasting Cyprus settlement in the light of International and European Law' at [16], available at: http://alfreddezayas.com/Law_history/Cyprusproposal.shtml [last accessed 31 March 2014].

[77] *Demopoulos*, supra n 3 at [16].

discriminatory restrictions on such rights on the basis of racial and ethnic considerations. It did not significantly differ from the constitutional arrangements introduced in Bosnia and Herzegovina and which were found by the ECtHR to be in violation of human rights.[78] Moreover, it concretised demographic alteration by allowing a large number of illegal Turkish settlers to remain in Cyprus. Such settlements impinge on the right to property and to return home and are in violation of article 49 (6) of the 1949 Fourth Geneva Convention - by which Turkey is legally bound - and customary international law.[79] The prohibition of population transfers by an occupying power is absolute and not subject to any exceptions such as military necessity.[80] Moreover, transfers constitute grave breaches and war crimes under article 85 (4) and (5) of Additional Protocol I (although this has not been signed by Turkey) and under article 8 of the Rome Statute.[81]

In this regard, any settlement must adhere to the fundamental rights and democratic principles on which the Council of Europe is founded.[82] Territorial acquisition through aggression, war crimes and crimes against humanity, such as ethnic cleansing and displacement on discriminatory grounds, should not be recognised.[83]

Most worryingly, the ECtHR influenced by the political realities on the ground seems to submit to such realities at the expense of human rights and the rule of law.[84] In its own admission,

> the Court finds itself faced with cases burdened with a *political, historical and factual complexity* flowing from a problem that should have been resolved by all parties assuming full responsibility for finding *a solution on a political level*. This *reality*, as well as the passage of time and the continuing evolution of the broader *political dispute must inform* the Court's interpretation and

[78] See *Sejdić and Finci* v *Bosnia and Herzegovina* Application Nos 27996/06, 34836/06), Merits and Just Satisfaction, 22 December 2009.

[79] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) Vol. I at 462-63.

[80] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, ICJ Reports 2004 136 at 192. See Geneva Convention relative to the protection of civilians in time of war (adopted 12 August 1949, entered into force 21 October 1950) 973 *UNTS* 75, 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 *UNTS* 1 (Additional Protocol I).

[81] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 *UNTS* 3.

[82] Also see Buyse, supra n 34 at 58.

[83] See General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) which provides for an express right of the displaced to return to their homes and an obligation to repeal discriminatory legislation and administrative practices. Buyse, ibid, at 165; Phuong, *The International Protection of Internally Displaced Persons* (Cambridge: Cambridge University Press, 2004) at 180; De Zayas, 'International Law and Mass Population Transfers', (1975) 16 *Harvard International Law Journal* 207 at 222.

[84] As noted, 'the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention.' *Broniowski* v *Poland* (2005); 40 EHRR 21 at [147].

> application of the Convention which cannot, if it is to be coherent and meaningful, be either static or *blind to concrete factual circumstances*.[85]

There are two main issues that emanate from this passage and which will be considered in turn. These relate to the relevance of political and factual realities for the resolution of human rights violations and the passage of time.

Whilst the political nature of the Cyprus problem is undisputed, it is also undisputed that it remains firstly a problem that is subjected to international human rights and humanitarian law. The UN Charter itself stipulates the obligation to settle international disputes in compliance with principles of justice and international law.[86] The *realpolitik* which the ECtHR refers to provides an excuse to be exempted from law.[87] This is contrary to the rules on state responsibility which dictate cessation of the wrongdoing, restitution, and, when this is not possible, compensation for any loss incurred. As noted, there is a 'need to prevent the completed wrong or the continuing wrong ... from surviving through its consequences.'[88] This is closely related to the Permanent Court of International Justice's (PCIJ) pronouncement according to which 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'[89] The ICJ for its part has stressed that the political nature of a dispute did not prevent it from focusing on its legal aspects.[90] Accordingly, the political character of the situation in Cyprus does not bring it outside the realm of law. Importantly, the enjoyment of rights is not conditioned on the non-political nature of the dispute. By contrast, international human rights law protects the individual from arbitrary state action in all circumstances. As a consequence, no state action can be exempted from such legal scrutiny.

Nor is the submission that fundamental rights, including the rights to property and home, can be erased with the lapse of time in accordance with international law. As rightly pointed out, 'Allowing the time factor to weigh against the claimant in such a case would result in the legitimization of the State's arbitrary or discriminatory refusal to allow the entry of the individual to his or her "own country".'[91] Veraart agrees and challenges the position that the passage of time erodes legal claims, particularly in the case of flagrant violations of international law.[92] Property restitution for instance, irrespective of

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[85] *Demopoulos*, supra n 3 at [85] [emphasis added]. Similar distinction between political and legal disputes was made in relation to the Palestinian problem: Lawand, 'The Right to Return of Palestinians in International Law', (1996) 8 No. 4 *International Journal of Refugee Law* 532 at 533.

[86] Article 1, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 *UNTS* XVI.

[87] Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933) at 6. For analysis Katselli, 'The Rule of Law and the Role of Human Rights in Contemporary International Law' in R. Dickinson et al (eds), *Examining Critical Perspectives on Human Rights* (Cambridge: Cambridge University Press, 2012) 131.

[88] Tammes, 'Means of Redress in the General International Law of Peace', in Kalshoven, *Essays on the Development of the International Legal Order in Memory of Haro F. Van Panhuys* (Alpben: Sijthoff & Noordhoff International Publishers, 1980) 1 at 4.

[89] *Chorzow Factory Case*, Merits, PCIJ (1928) Series A, No. 17 at 47.

[90] *Wall Advisory Opinion*, supra n 80 at 155.

[91] Lawand, supra n 85 at 556-57.

[92] Veraart, 'Redressing the Past with an Eye to the Future. The Impact of the Passage of Time on Property Rights Restitution in Post-Apartheid South Africa', (2009) 27 No. 1 *Netherlands Quarterly of Human Rights* 45 at 46.

the lapse of time, has symbolic value as restoration of the legal order itself. As noted, 'finding a legal response to extreme injustice would be always a meaningful project, irrespective of the passage of time.'[93] Hence, such restitution is necessary to undo the unjust enrichment.[94] Indeed, 'No healing is possible without reconciliation, and no reconciliation is possible without justice, and no justice is possible without some form of genuine restitution.'[95]

Dealing with past injustices and protecting effectively human rights (and restoring them) is an essential component of any peace process.[96] Accordingly, the ECtHR's conclusion that 'with the passage of time the holding of a title may be emptied of any practical consequences'[97] finds no support in international law. Both The Hague Regulations and the Fourth Geneva Convention prohibit expropriation of property during armed conflict unconditionally, a matter discussed below.[98] The passage of time is therefore neither sufficient to take away the illegality of the act nor to remove the title concerned. Nor does it entitle the wrongdoing state to choose the form of remedy to be provided.[99] Questions also arise regarding the ECtHR's conclusion that the link between one of the applicants in *Demopoulos* with her home had been broken. The fact that the applicant was only two years old when she abandoned her home should not be sufficient to deprive her of the protection of article 8 ECHR. In this regard, neither a wrongful act nor time can break the legal bond that individuals have with their home.[100]

Furthermore, the passage of time does not eliminate the wrongfulness of the act or the state's responsibility for an act it has ceased committing.[101] Even more so, the passage of time has no relevance when the violation is continuing.[102]

It can therefore be concluded that the rights of the displaced relating to their property and home cannot be compromised as a result of political or factual realities or the passage of time. Nor can a state benefit from its wrongdoing, a principle well established in international law.[103] To the contrary, it is in these circumstances that the ECtHR is called on to ensure cessation of the violation and to safeguard the rights of the dispossessed against state abuse. In the light of this analysis, the next section considers the procedure before the IPC. To what extent should individuals be expected to exhaust

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[93] Ibid, at 59.
[94] Friedmann, 'The Uses of "General Principles" in the Development of International Law', (1963) 57 *American Journal of International Law* 279 at 295.
[95] Beyers Naude quoted in Hay, 'Grappling with the Past: The Truth and Reconciliation Commission of South Africa', (1999) 1 *African Journal in Conflict Resolution* 1.
[96] Hay, ibid, at 12.
[97] *Demopoulos*, supra n 3 at [111].
[98] Article 46, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (adopted 18 October 1907, entered into force 26 January 1910). Articles 46 and 147, Geneva Convention, supra n 80.
[99] International Commission of Jurists, 'The Right to a Remedy and to Reparation for Gross Human Rights Violations' (Practitioners' Guide Series No. 2: 2006) at 46, available at: www.unhcr.org/refworld/docid/4a7838b42.html [last accessed: 31 March 2014].
[100] Buyse, supra n 34 at 38 and 46; *Zavou and others* v *Turkey*, (Appl. no. 16654/90), Judgment 22 September 2009.
[101] *Namibia* Advisory Opinion, supra n 64 at [118] and [125].
[102] Commentary to Articles 13 and 14, Final Articles on Responsibility of States for Internationally Wrongful Acts in Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 133 and 136.
[103] Also see Allen, supra n 24.

such remedy and be subjected to the procedure of pilot judgments? The analysis that follows demonstrates the reasons why the remedy in question is not effective as required under articles 13 and 35 ECHR and as set out in *Akdivar*.[104]

## 6. The Immovable Property Commission as an Effective Remedy?

### *A. Legal Nature and Effects of the Immovable Property Commission*

One of the controversial issues in *Demopoulos* is the conclusion that the IPC provides an effective remedy.[105] Is, however, a remedy effective when it is the product of a violation of human rights, the law of armed conflict and humanitarian law?[106] The acquisition of territory through force constitutes a violation of a peremptory norm, and as such states have an obligation not to recognise the wrongful act or its consequences.[107] Whilst the ECtHR refused to consider sovereign issues or breaches of international law, such determination was essential for deciding the effectiveness of the remedy before it.[108] This is because the ECHR must not be read in a vacuum but in harmony with other rules of international law.[109]

Despite this, the ECtHR concluded that

> It can hardly be expected, for evident practical reasons, that the "TRNC" authorities themselves proceed to pronounce the legal and administrative system in the occupied areas to be null and void in order to satisfy the points of principle raised by the applicants and intervening Government.[110]

Yet, fundamental normative principles cannot be compromised in favour of practicalities.

As noted earlier, the ECtHR relied on *Namibia* which accepted as domestic remedies deeds of an unlawful *de facto* organ.[111] The ECtHR was indeed anxious not to create a 'legal vacuum' for those affected by foreign occupation and to enable them to seek protection of their fundamental rights.[112] Truly, it is important that these rights are fully protected particularly during conflict. The Opinion on *Namibia* aimed to protect legal transactions and arrangements made to the benefit of inhabitants of occupied territory.[113] However, whilst the ECtHR in *Demopoulos* was keen to recognize IPC acts,

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[104] *Akdivar and Others* v *Turkey* (1997); 23 EHRR 143 at [66-7].
[105] *Demopoulos*, supra n 3 at [37].
[106] On conditions for the effectiveness of a remedy Helfer, supra n 56 at 145.
[107] Commentary to articles 40 and 41 of 2001, supra n 102 at 246 and 250; *Wall Advisory Opinion*, supra n 80 at 200.
[108] *Demopoulos*, supra n 3 at [115]. See ECtHR's conclusions on duty to provide diplomatic protection where refusal would involve a crime against humanity. *Al-Saadoon and Mufdhi* v *UK* (2009); 49 EHRR SE11.
[109] Also *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports 1996 I, 239 at [24]; *Concluding Observations of the Human Rights Committee: Israel* CCPR/CO/78/ISR (2003) at [11]; *Wall Advisory Opinion*, supra n 80 at 177; *Loizidou*, supra n 8 at [52].
[110] *Demopoulos*, supra n 3 at [107].
[111] *Namibia* Advisory Opinion, supra n 64 at 16; *Cyprus* v *Turkey*, supra n 10 at [91].
[112] *Demopoulos*, supra n 3 at [96].
[113] Ronen, 'Non-recognition, Jurisdiction and the TRNC before the European Court of Human Rights', (2003) *Cambridge Law Journal* 534 at 537.

in its later inadmissibility decision in *Meleagrou* it accepted as valid the IPC's refusal to recognize the transfer of property lawfully carried out by the authorities of the Republic of Cyprus. This issue is considered in Section 8.

Significantly, in this instance it is doubtful whether resort to the IPC which aims to further the *status quo* of occupation adequately safeguards the rights of those the ECtHR wished to protect.[114] In situations of a continuing violation of international law, the emphasis should be on the cessation of the wrongful act. Unless such cessation occurs and restoration of rights is completed, any remedy provided will be just an attempt to legitimize an illegal regime. The ECtHR interpreted *Namibia* 'solely from the standpoint of the Convention'[115] as opposed to general international rules which require non-recognition of unlawful acts.

Contrary to the ECtHR's conclusions, not all remedies which aim to advantage the individual would be effective. In this regard, the ECtHR broadened the scope of the 'Namibia principle' on the basis of 'logical necessity' and having read the Opinion 'in conjunction with the pleadings and the explanations given by some of that court's members.'[116] This interpretation is not justified by the relevant passage of the Opinion itself.[117] The Opinion should be therefore narrowly construed to include only deeds of the nature mentioned by the ICJ whose emergence is unrelated to the wrongful act: whether there exists a birth, death or marriage is irrelevant to the situation of foreign occupation. In contrast, property deprivation as part of policy and practice[118] is not but furtherance of foreign occupation, the illegality of which would be opposable *erga omnes*.[119] For this reason, the ECtHR should not have relied on the ICJ's 'minimalist remarks' in *Namibia*.[120] As pointed out, the ECtHR 'cannot examine the remedies of the "TRNC" in a vacuum, as if it were a normal Contracting Party, where it can be assumed that courts are "established by law" or that judges are independent and impartial.'[121]

It follows from this that the requirement for exhaustion of domestic remedies must comply with 'generally recognised rules of international law.'[122] Moreover, for a remedy to be effective it 'must never pose a theoretical obstacle to an international solution.'[123] In this instance, neither the IPC nor Turkey has any legal right on the properties of the displaced. Since the occupying power does not obtain sovereignty over occupied territory it should not possess legal capacity to decide whether restitution or compensation will be granted. Moreover, since the title to the property has not been lost,[124] any compensation

[114] Ibid.
[115] *Cyprus* v *Turkey*, supra n 10 at [91].
[116] Ibid, at [94], [96].
[117] Ibid, at [94].
[118] Ibid, at [185].
[119] *Namibia* Advisory Opinion, supra n 64 at [126].
[120] Partly Dissenting Opinion of Judge Palm, *Cyprus v Turkey*, supra n 10.
[121] Ibid.
[122] Partly Dissenting Opinion of Judge Marcus-Helmons, *Cyprus v Turkey*, supra n 10; also see *Loizidou*, supra n 8 at [44]; SC Res 242, 22 November 1967, S/RES/242 (1967); SC Res 298, 25 September 1971, S/RES/298 (1971); and SC Res 478, 20 August 1980, S/RES/478 (1980) regarding legislative acts altering the status of Palestinian territories.
[123] Partly Dissenting Opinion of Judge Marcus-Helmons, *Cyprus* v *Turkey*, ibid.
[124] *Loizidou* supra n 8 at [63].

offered does not remove the claim over property restitution. This is because the TRNC acts are in breach of international law.[125]

The IPC provides compensation not for the loss of previous use, but rather, as a way of expropriating the affected properties. Section 10 of law 67/2005 illustrates this by providing that those who receive compensation or another property can no longer claim a right of ownership. Moreover, the IPC is empowered to decide as to restitution, exchange of property or compensation.[126]

The inviolability of property rights during military occupation is well-protected in international humanitarian law. Any acquisition of private property against the will and consent of the owner violates international law even if there has been 'payment of a price or other adequate consideration.' This is particularly so when the property owner acts under 'threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will.'[127]

Furthermore, article 55 of the Fourth Geneva Convention prohibits confiscation of private property. Turkey, as an occupying power bound by the Convention has a duty to respect the occupied territory's laws. Moreover, the occupied territory's courts shall continue to function - which is not applicable in this instance. In cases concerning territorial re-adjustments that come as the consequence of armed force, the duty not to recognise the wrongdoing remains intact. This entails a duty not to recognise the decisions of an unlawful authority, an issue of particular relevance in relation to the IPC, and not to recognise territorial changes.[128] As pointed out, 'the idea of a general *duty* to deny effect to unlawful acts has been entertained for a long time in the inter-American world as a device for the maintenance of international law against the "principle of conquest".'[129] According to Tammes, the use of armed force entails a bar on moving treaty frontiers whilst any property, rights and interests will not be transferred to the wrongdoer.[130] As a result, neither Turkey nor the IPC can lawfully alter the rights of internally displaced persons (IDPs), rendering the IPC remedy ineffective. The very most that the IPC could perhaps do is to award compensation for the loss of use of property and for denial of access. Instead, Turkey's resolution of property claims by the IPC is intended to be permanent. As Judge Koroma pointed out, any activities 'of a sovereign nature which will change their status as occupied territory' are illegal. According to him, 'The essence of occupation is that it is only of a temporary nature and should serve the interests of the population and the military needs of the occupying Power.'[131]

IPC decisions will have the effect of altering the status of property in occupied Cyprus. They will also inevitably have an impact on the right to home, free movement and settlement in breach of international humanitarian law. As the ICJ stressed, article 49 of the Fourth Geneva Convention does not only prohibit the act of deportation or transfer

[125] Supra n 24 at 13.
[126] See section 8 of Law 67/2005, supra n 5.
[127] *Krauch (I.G.Farben Trial) case,* Judgment, 29 July 1948, US Military Tribunal, Law Reports of Trials of War Criminals (United Nations War Crimes Commission: 1949).
[128] Tammes, supra n 88 at 5.
[129] Ibid.
[130] Ibid, at 6.
[131] Separate Opinion of Judge Koroma, *Wall Advisory Opinion*, at 204 and conclusions of ICJ, supra n 80 at 184.

of population but any measure taken in organizing or encouraging such transfer.[132] Article 49 further proceeds to establish an obligation upon an occupying power to allow the return of the displaced people to their homes as soon as the hostilities have ended. At the same time, article 147 stipulates that unlawful deportation or transfer or extensive appropriation of property on discriminatory grounds constitutes a grave breach.[133]

It is therefore clear that the IPC is not in a position to effectively challenge the situation that brought it into force.[134] The IPC is also unable to authorise the return of the displaced. The ECtHR should have therefore prevented Turkey from adopting measures intended to alter the legal status of property acquired through force. Giving legal effect and validity to such acts is inconsistent with fundamental norms of international law. Importantly, 'the obligations of the state are also unconditional: they do not depend on one another, nor are they conditional on an individual complaint. They cannot be renounced by victims.'[135]

The preceding analysis has demonstrated that the IPC, established as a direct consequence of unlawful acquisition of territory by force,[136] does not provide an effective remedy.[137] This is even more so when the wrongful act is continuing as a result of official policy and administrative practice, which is considered next.

### *B. Administrative Practice, Effectiveness and the Immovable Property Commission*

According to well established ECtHR jurisprudence, the repetition of the wrongful act as part of a policy makes remedies 'futile' and is sufficient to relieve individuals from the duty to exhaust domestic remedies.[138] This is because the ECtHR 'must take *realistic* account not only of the existence of formal remedies in the legal system of the Contracting Party concerned *but also of the general legal and political context in which they operate* as well as the personal circumstances of the applicants.'[139] Turkey has pursued property deprivation and denial of the right to return home as official policy and administrative practice.[140] Such policy 'would remain unchanged pending agreement on an overall political solution to the Cypriot question.'[141] This led the ECtHR to previously conclude that the affected individual was relieved from the duty to exhaust domestic remedies as they would be unable to challenge it.[142] This policy 'must be considered continuing',[143] and indeed remains unchanged up to the present day. The persisting heavy presence of Turkish troops and the demographic alteration that was achieved as a result

[132] Ibid, at 183.
[133] Geneva Convention, supra n 80.
[134] International Jurists Opinion on Exhaustion of Local Remedies prepared by Prof. R. Amerasinghe, Sir I. Brownlie, Prof. J. Dugard, Prof. G. Hafner, Prof. A. Pellet, Prof. W. Schabas, Prof. C. Tomuschat, 4 December 2009. The author would like to thank Dr Claire Palley for allowing her access to this document.
[135] International Commission of Jurists, supra 99.
[136] On acquisition of territory through force see *Wall Advisory Opinion*, supra n 80 at 171.
[137] International Jurists Opinion, supra n 134.
[138] *Akdivar and Others*, supra n 104 at [67]; *Cyprus v Turkey*, supra n 10 at [99].
[139] *Akdivar and Others*, ibid, at [69] [emphasis added]. Also Hampson, 'An Overview of the Reform of the UN Human Rights Machinery', (2007) 7 No. 1 *Human Rights Law Review* 7 at 13.
[140] *Cyprus* v *Turkey*, supra n 10 at [168].
[141] Ibid, at [171], [172].
[142] Ibid, at [193].
[143] Ibid, at [174].

of transferring Turkish population to occupied Cyprus are evidence of this. The IPC cannot escape from this policy as it is the direct product of it.[144] Effectively, this is equivalent to failure to respond to the serious human rights violations.[145]

Similarly, the procedure of pilot judgments must provide an opportunity for cessation of the violations.[146] As stressed, 'it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed'.[147] In this instance, neither Turkey nor the IPC has implemented a remedy which is capable of addressing the systemic problem, which remains one of occupation and ethnic division.

In conclusion, the ECtHR should have held in *Demopoulos* that the duty to exhaust domestic remedies through the IPC was inoperable due to the pertaining serious violations committed by Turkey. Remedies must provide 'real access to justice' and rectify the violation.[148] The ability to order cessation and enforcement are essential requirements for an effective remedy, qualities not satisfied here.[149] In the absence of these, the ECtHR has no longer a subsidiary role to play. On the contrary, it must ensure that affected individuals are protected against remedies which aim to shield state abuses rather than to genuinely bring these to an end. Its heavy workload must not compromise the fundamental role it has been entrusted with in safeguarding human rights.

The next section discusses the significance of property restitution and the right to return home under international law and how the IPC interferes with such rights.

## 7. The Right to Property Restitution and to Return Home under International Law

Property is today well protected under customary international law and regional instruments such as the ECHR. It also finds protection in national laws, and, indirectly, through the principle of non-discrimination, in the International Covenant on Civil and Political Rights.[150] Due to the detrimental effects of displacement, property restitution goes to the heart of the right to return. This arguably entails not only the right to return to one's country, but quite significantly, the right to return to one's home.[151]

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[144] Helfer, supra n 56 at 158; Combacau and Sur, *Droit International Public*, 4th ed. (Paris: Montchrestien, 1999) at 547.

[145] Sullivan, 'Overview of the Rule requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW' (IWRAW Asia Pacific: 2008) at 14-5, available at: www.iwraw-ap.org/publications/doc/DonnaExhaustionWeb_corrected_version_march%2031.pdf [last accessed 31 March 2014].

[146] See Sadurski, supra n 58 at 420.

[147] *Maestri* v *Italy* (2004); 39 EHRR 38 at [47].

[148] International Commission of Jurists, supra n 99.

[149] Human Rights Committee, General Comment No 31: The nature of the general legal obligation imposed on states parties to the Covenant, 26 May 2004, CCPR/C/21/Re v.1/Add.13 (2004) at [15]; International Commission of Jurists, ibid; OC-9/87, *Judicial Guarantees in States of Emergency* IACtHR Series A 9 (1987) at [2] 4.

[150] See *S.W.M. Broeks* v *Netherlands* (172/1984), CCPR/C/29/D/172/1984 at [12.4]; Choudhury, 'Interpreting the Right to Equality Under Article 26 of the International Covenant on Civil and Political Rights', (2003) 1 *European Human Rights Law Review* 24 at 24.

[151] Leckie, *Housing and Property Restitution for Refugees and Internally Displaced Persons: International, Regional and National Legal Responses* (Geneva: Sources 7, Centre on Housing Rights and Evictions, May 2001) at 7 and 9.

To this effect, principle 21 of the 1998 Guiding Principles on Internal Displacement (Guiding Principles) protects IDPs against arbitrary deprivation of property and possessions.[152] Significantly, principle 29 stipulates that competent authorities must facilitate the return of IDPs and the recovery of their property. Property restoration is also safeguarded under principle 2.1 of the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles).[153] Under this provision, compensation should only be provided if restitution is factually impossible.[154] Whilst the Guiding and the Pinheiro Principles are not legally binding, they constitute authoritative instruments particularly to the extent that they reflect existing customary rules.[155]

Hence, the return of property to its legitimate owners gains particular significance as a tool of restoring justice and the rule of law. Importantly, unresolved property issues can cause further conflict,[156] whilst property restitution is a tool for 'reinstating victims as full participants in the social, political and economic life of the community.'[157]

Restitution is therefore a principle of primary importance in international law.[158] The International Law Commission emphasises this by noting that 'restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act', including the return of property.[159] Restitution is also imperative in cases of violations of peremptory norms of international law such as aggression and acquisition of territory by force.[160] The occupying state is under an obligation to withdraw its forces and to allow the return of persons or property.[161] Significantly, 'the wrongdoing state may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.'[162]

Accordingly, the ECtHR's conclusion in *Demopoulos* that a state cannot be expected to provide restitution in situations of military occupation is disputed.[163] Whilst it does not recognise the effects of military occupation, it takes 'a practical approach to an

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[152] UN Commission on Human Rights, 11 February 1998, E/CN.4/1998/53/Add.2.

[153] 'Housing and property restitution in the context of the return of refugees and internally displaced persons', Final report of the Special Rapporteur Paulo Sergio Pinheiro, submitted in accordance with Sub-Commission resolution 2004/2, UN Doc E/CN.4/Sub. 2/2005/17, 28 June 2005.

[154] On duty to restore also see *Chorzow Factory Case*, supra n 89 at 48.

[155] Kaelin, 'Internal Displacement and the Protection of Property' in Cheneval, 'Property Rights as Human Rights', in de Soto and Cheneval (eds), *Realizing Property Rights* (Zurich: Ruffer & Rub, 2006) at 185; Phuong, supra n 83 at 56 and 64-5.

[156] 'Property Law Implementation Plan: Inter-Agency Framework Document', adopted by OHR, UNHCR, OSCE, UNMIBH and CRPC, October 2000. One of the aims of the plan was the resolution of claims of property repossession by displaced persons. For an analysis see Buyse, supra n 34 at 324 *et seq.*

[157] Allen and Douglas, supra n 28 at 215.

[158] *Wall Advisory Opinion*, supra n 80 at 198. Also Fay and James, '"Restoring What Was Ours": An Introduction', in Fay and James (eds), *The Rights and Wrongs of Land Restitution: Restoring What Was Ours* (New York: Routledge-Cavendish, 2009) 1 at 4.

[159] Commentary to article 50, supra n 102 at 213.

[160] Ibid, at 246 and 250.

[161] Ibid, at 215-16.

[162] Ibid, at 216. Also McBride, 'Compensation, Restitution and Human Rights in Post-Communist Europe' in Meisel and Cook, *Property and Protection Legal Rights and Restrictions: Essays in Honour of Brian W. Harvey* (Oxford: Hart Publishing, 2000) 87 at 96.

[163] *Demopoulos*, supra n 3 at [112].

overtly political problem.'[164] Further, whilst it rejects that military occupation is a form of adverse possession by which a title can be legally transferred, it goes on to add that

> it would be unrealistic to expect that … these applicants obtain access to, and full possession of, their properties, irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes.[165]

Finally, whilst the ECtHR initially recognises that restitution can only be denied in case of impossibility, it does not consider whether restitution was impossible in the cases before it. [166]

Refusal to provide restitution as primary objective would contravene the spirit and letter of the ECHR since the protection of dignity through property restitution is at the heart of P1-1.[167] It would also deviate from previous jurisprudence according to which compensation alone is not a 'complete system of redress.'[168] As the ECtHR has repeatedly held, Turkey is responsible for the continuous total denial of access to and control of, use and enjoyment of the property by Greek-Cypriots, *in addition to* the denial of compensation for such interference.[169]

Restitution is also imperative under international humanitarian law. Population transfers constitute war crimes and may amount to crimes against humanity if committed in a widespread or systematic manner.[170] The ECtHR should have therefore concluded that Turkey had an obligation to provide restitution.[171]

Importantly, restitution is not conditional upon the rights of third parties since the right of the legitimate owner is stronger in international law.[172] States are not allowed to use humanitarian considerations for refusing property restitution to legitimate owners.[173] Rather, states have an obligation to take all necessary steps to assist current users by providing them with alternative accommodation. As rightly argued by Buyse, an approach based on human rights rather than reciprocity 'offers to each and every one of the displaced the possibility to reclaim what was lost.'[174] Instead, law 67/2005 makes property claims conditional upon the non-existence of other claimants. This would include claims from settlers or nationals of other states such as in the case of *Orams*.[175]

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[164] Sanger, 'Case Comment: Property Rights in an Occupied Territory', 70 *Cambridge Law Journal* (2011) No. 1 at 7-9.
[165] *Demopoulos*, supra n 3 at [111], [112].
[166] Ibid, at [112], [114].
[167] See analysis in Allen, supra n 24 at 9-10.
[168] *Xenides-Aresti*, supra n 16.
[169] *Cyprus* v *Turkey*, supra n 10 at [189].
[170] Bantekas and Nash, *International Criminal Law*, 3rd ed. (London: Routledge, 2007) at 117.
[171] Instead, see *Demopoulos*, supra n 3 at [114-15].
[172] Phuong, supra n 83 at 194. Also McBride, supra n 162 at 98; Leckie, 'New Directions in Housing and Property Restitution', in Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Ardsley, New York: Transnational Publishers, 2003) 3 at 47-8.
[173] 'Property Law Implementation Plan: Inter-Agency Framework Document', supra n 156.
[174] Buyse, supra n 34 at 14.
[175] Case C-420/07 *Apostolides* v *Orams* (ECJ 28 April 2009).

To this effect, the distinction that the ECtHR made between *Demopoulos* and *Pincova* is not justified.[176] In the latter case, the ECtHR recognised the initial owner's right to claim back his property which had been unlawfully confiscated by the communist regime in 1948. This was despite the fact that the applicants had been living in the house as tenants since 1953, and had purchased the property in good faith in 1967. The ECtHR held that the restitution laws adopted in 1992 with the purpose of reinstating the rights of the property owner pursued a legitimate aim and were 'means of safeguarding the lawfulness of legal transactions.'[177] Hence, it was accepted that the restitution given effect in this instance aimed at restoring legality.[178]

Instead, in *Demopoulos* the emphasis is on not causing 'injustice' to third parties, whose claim has no foundation in international law.[179] In doing so, injustice is caused to the right-holders. As Allen points out, 'there is no sensible argument that the revival of property rights would amount to an injustice so extreme that a court should disregard them.'[180] The ECtHR in this instance was reluctant to expressly condemn serious injustices caused as part of ethnic cleansing and to protect the right to return home.[181]

It has been shown that to overlook the right to property restitution and to return home in light of practical or political realities is to allow the violator to benefit from their wrongdoing.[182] To this effect, the inability of the IPC to ensure these rights provides an additional reason why it does not constitute an effective remedy.

## 8. Property Restitution, the Immovable Property Commission and the Case of *Meleagrou*

The preceding analysis demonstrates that Turkey has a continuing legal duty to provide restitution. The IPC provides therefore only a 'fictional instrument' for remedying property-related claims.[183] Its power to order restitution is handicapped by a number of conditions that go beyond those provided under P1-1 or general international law. Restitution under law 67/2005 does not appear to be a right which can only be exceptionally denied. It can be refused on grounds of national security, public order or interest, for reasons of social justice or whenever the property concerned is located in a military area. On Turkey's own admission, restitution is also precluded if the property concerned was transferred to non-state natural or to legal persons so that a 'fair balance between these conflicting rights' of the legitimate owner and the occupier would be struck.[184] The IPC aims to resolve property claims 'without prejudice to the rights of the

[176] *Demopoulos,* supra n 3 at [117]; *Pincová and Pinc* v *the Czech Republic* Application No 36548/97, Merits and Just Satisfaction, 5 November 2002.
[177] Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2009) at 136; *Pincová*, ibid, at [58].
[178] *Pincová*, ibid, at [49] and [51].
[179] *Demopoulos*, supra n 3 at [117].
[180] Allen, supra n 24 at 27.
[181] Ibid, at 45.
[182] Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies', (1959) 34 *British Yearbook of International Law* 83 quoted in International Jurists Opinion on Exhaustion of Local Remedies, supra n 134.
[183] *Broniowski*, supra n 84 at [180-81].
[184] *Demopoulos*, supra n 3 at [52].

Turkish Cypriot Community.'[185] In those cases where restitution is decided, such restitution will not necessarily be given effect until after a final settlement of the Cyprus problem. Even in these cases, however, restitution will not be automatic since the current holder will have to be granted either compensation or be given alternative accommodation as part of the final settlement. Hence, restitution is made conditional upon future and uncertain events which render the IPC ineffective.[186]

According to sources from the TRNC there have been 5754 applications of which only 612 have been finalised. 477 applications have been settled through friendly settlement. Out of these, only 11 went through formal hearings. In 2 cases the IPC decided exchange and compensation, in 1 case restitution, in 5 cases restitution and compensation whilst in another case it decided on restitution after the settlement of the Cyprus problem.[187] 124 applications have been revoked. Whilst the number of applications before the IPC is significant, something that prompted Cyprus to explore ways to set up alternative mechanisms to support the displaced and those who wish to turn to the IPC,[188] it still represents a small percentage of the overall displaced population of 200,000 who choose not to bring a claim before it. Indeed, more individuals would have brought their claims before the IPC, had it been a genuinely effective remedy.

It becomes evident from the above figures that restitution is a rare exception. Even in cases where restitution has been decided, there still has not been restitution in practice. Buyse makes a significant point in this regard: restitution recognised by law or through judicial decisions but 'without the practical possibility to dispose of the property concerned does not end a situation of interference with property rights, but prolongs it.'[189]

The extent of the IPC's ineffectiveness and the detrimental impact of *Demopoulos* are revealed in the case of *Meleagrou. Meleagrou* concerned three separate applications brought directly before the IPC 4 years before *Demopoulos* for the restitution of, and compensation for loss of use and non-pecuniary damage of 18 plots of land. After three hearings in November 2008, January and May 2009 the IPC rejected all the claims in October 2009.

The IPC relied on various grounds. First, it refused to recognise one of the applicant's ownership for 14 plots on the ground that according to TRNC 1974 land registry records these were not registered in her name in 1974, nor was she the legal heir of the 1974 owner as required under law 67/2005.[190] This was despite the fact that these were transferred, according to Cyprus Land Registry records, lawfully by the company to which they were registered in 1974 to the applicant's husband and eventually to her in 2001. It is noteworthy that the ownership was never disputed during negotiations but only after the applicant's insistence on restitution.[191]

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[185] Immovable Property Commission, available at: http://www.tamk.gov.ct.tr/english/index.html [last accessed 31 March 2014].
[186] *Luyeye Magana ex-Philibert* v *Zaire* (90/1981), Jurisprudence, CCPR/C/19/D/90/1991 (1983).
[187] Supra n 185.
[188] 'State mulls compensating IPC applicants', Cyprus Mail, 18 December 2013.
[189] Buyse, supra n 34 at 243; *Broniowski*, supra n 84 at [185-86].
[190] Supra n 5; *Ivy Meleagrou*, Appl. No. 70/2006, 14 October 2009.
[191] *Meleagrou et al v Turkey*, Application No, 14434/09, Part III, Statement of alleged violations of the Convention. The author is grateful to Eleni Meleagrou for access to themnbse documents.

Secondly, it denied restitution where land was allocated to a dispossessed owner, reserved for military purposes or constituted a coastal line. This was despite the fact that one of the plots with one of the applicants' home was found to be registered in a Turkish settler's name,[192] whilst a part of another had been leased to Sunzest Trading Ltd, a company owned by Asil Nadir.[193] Significantly, the IPC refused to award compensation for loss of use and non-pecuniary damage since the applicants failed to claim compensation for effectively the expropriation of land or exchange according to article 8 of Law 67/2005.[194] The IPC also refused to award compensation for non-pecuniary damage for fields.[195]

The IPC did however allow restitution of part of one plot since it had never been used as a forest as it was declared,[196] although this is still to materialise.[197]

After exhausting all available remedies, the applicants resorted to the ECtHR which declared their applications inadmissible. The ECtHR refused to accept, as it had previously done,[198] the company's ownership transfer for the 14 plots.[199] This was despite the fact that the transfer was carried out lawfully by internationally recognised authorities and it is to be contrasted with the ECtHR's willingness to recognise TRNC deeds as valid on the basis of *Namibia.*

The ECtHR also concluded that whilst the applicants did resort to the IPC they failed to make 'proper use' of available remedies. By only requesting restitution they failed to request exchange of property or pecuniary compensation for the land, which would also have included compensation for loss of use and non-pecuniary damage. As stressed, 'The fact that the applicants did not want to claim redress which would have led to them giving up their claim of title to the land is not relevant to this assessment. It was their choice, but it excluded them from obtaining the other available remedies.'[200] In this regard, the ECtHR disregarded that compensation 'cures and rewards' ethnic cleansing by removing ownership.[201]

The impact of *Demopoulos* is clear with an arbitrary expansion of the circumstances under which restitution can be refused.[202] Furthermore, the ECtHR failed to consider in any substantive matter whether the remedy concerned was effective as applied in the facts of *Meleagrou.* This is further evident from recent revelations that the area regarded by the IPC and the ECtHR as a military zone (Pente Mili) is reported to

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[192] *Meleagrou et al v Turkey,* Application No, 14434/09, Part I, Statement of Facts; *Mando Meleagrou,* Appl. No. 71/2006, 14 October 2009; *Ivy Meleagrou*, supra n 190.

[193] For his links with the company in possession of the applicant's property see http://en.wikipedia.org/wiki/Polly_Peck [last accessed 31 March 2014]; *Loukis Meleagrou,* Appl. No. 72/2006, 14 October 2009.

[194] *Ivy Meleagrou,* supra n 190.

[195] *Loukis Meleagrou,* supra n 192.

[196] Ibid.

[197] Eleni Meleagrou, Skype interview, 2 December 2013.

[198] Supra n 16; *Eugenia Michaelidou Developments Ltd et al v Turkey* Application No 16163/90, Merits and Just Satisfaction, 31 July 2003.

[199] Supra n 7 at [12].

[200] Ibid, at [15].

[201] Cox, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina', (1998) *International and Comparative Law Quarterly* 599 at 612.

[202] Supra n 7 at [14].

have been rented to a Turkish company to carry out hotel investments.[203] Moreover, the ECtHR refused to consider compensation for non-pecuniary damages for uninhabited land.[204]

Whilst *Meleagrou* raises a number of significant legal issues worthy of separate consideration, it becomes clear that it effectively erodes states' obligations towards restitution, particularly in this context. Even more so, it upholds the occupying power's position to punish the applicants for not accepting expropriation of their land contrary to previous case law according to which restitution was a pre-condition for the effectiveness of any remedy.[205]

That the IPC has no intention of terminating the violations is further evident by the testimony of those who take claims before it, although verifying facts remains difficult. This is because Cyprus still refuses to recognise the IPC,[206] and as a consequence it possesses no information on the number or outcome of applications before the IPC, whilst applicants refuse to openly discuss their cases.

Nevertheless, information obtained reveals the existing difficulties in receiving effective therapy by the IPC which only compensates for land expropriation.[207] Moreover, the procedure before the IPC is described as 'pointless' and 'prohibitive' and subject to a number of unjustified delays.[208] Whilst the applications of Meleagrou were the first to go to a hearing,[209] it took 5 years before reaching a decision. Furthermore, whilst the IPC is required to give an opinion within 30 days from receiving an application it takes two years to do so as it appears to be under-staffed. For instance, the opinion for a claim submitted on 10 August 2011 was issued on 19 September 2013. One also needs to look at the data available to see the number of cases adjourned '*sine die*'.[210] Even if cases are settled it may take months before the IPC signs the deal and even longer before the applicant is actually compensated.[211]

From further research[212] it also became clear that applicants fall into two categories: those who want to sell their property for mainly financial reasons and those who aim to re-possess their property and obtain compensation for loss of use plus interest since 1974. The first category represents the majority of applicants who are in financial hardship. This comes as no surprise under the current financial climate in Cyprus. These applicants are desperate and keen to accept any compensation without going to a hearing. The compensation is calculated on the devaluation of property in the occupied areas

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[203] 'Νοίκιασαν την παραλία του Πέντε Μίλι σε τουρκική εταιρεία', *Sigma Live*, 19 January 2014, available at: http://www.sigmalive.com/news/local/92956 [last accessed 31 March 2014].
[204] Supra n 7 at [14].
[205] Supra n 8 at [44] – [45]; supra n 16.
[206] Nikolas Kuriacou, Attorney-General Office, Republic of Cyprus, 7 January 2014.
[207] Supra n 197. Meleagrou, in addition to taking her family's claims before the IPC, represents other Greek Cypriot claims.
[208] Ibid.
[209] *Meleagrou et al v Turkey*, Application No, 14434/09, Part II, Application of Domestic Laws in the present case.
[210] Monthly Bulletin, 31 January 2014, available at: http://www.tamk.gov.ct.tr/dokuman/istatistik_ocak14ing.pdf [last accessed 31March 2014].
[211] Supra n 197.
[212] All the information that follows was obtained through direct sources who spoke on condition of anonymity.

which appears to be at variance with ECtHR awards made in similar cases.[213] Applicants feel frustrated by the low compensation they receive. In many cases where the offer is too low, they prefer to withdraw their claim without prejudice rather than have to wait 5-7 years for the completion of the IPC process before going to the ECtHR.

Those applicants who insist on restitution are a minority and their claims are additionally faced with repeated non-substantive demands thereby exercising pressure to settle. The low number of cases that reached hearing proceedings (11)[214] confirms a trend on the IPC's part, which is involved in the negotiations, to avoid such hearings and to settle. This is further evidenced by the fact that hearings are only possible in the presence of the two foreign IPC members which take place for about a week, 3-4 times a year.

Moreover, the procedure before the IPC is lengthy owed to practical difficulties to handle the number of claims and to prepare valuations, as well as to an apparent lack of motivation to speed up the procedures particularly 'after it secured *Demopoulos*'.

Problems also arise relating to property situated in the enclosure of Famagusta – a key area in the ongoing negotiations - as the authorities employ some 'dirty tricks'. If an applicant files a claim for different properties one of which is in the fenced city, the authorities exercise pressure upon them, through non-filing of their opposition, to drop their claim regarding such property in order to consider their claims for property elsewhere.

Difficulties also exist relating to stricter demands for presentation of documents to establish ownership, such as the identity card of people who may have been dead for decades, or issues relating to accurate document translation.

Another significant problem arises with properties burdened with a mortgage. Whilst after the invasion banks in the free areas proceeded to cancel mortgages relating to properties in the occupied areas, the TRNC Land Registry Office does not have these updated records. This prevents the hearing of such claims.

As is clear from Bosnia and Herzegovina's example, under-staffing, slow procedures and the imposition of difficult to overcome hurdles are indicative of the low interest in providing effective human rights protection.[215] It therefore becomes clear that *Demopoulos* not only offers little incentive for the restoration of rights of the displaced in Cyprus, but it is also used to formalize human rights abuses. Accordingly, a political solution in Cyprus is hardly likely to restore the human rights of the displaced. Turkey has no genuine intention to reverse the *status quo*. To the contrary, it aims to retain control through ethnic division materialised through complete denial of restitution. Furthermore, Turkey still refuses to pay the compensation awarded by the ECtHR in the cases preceding *Demopoulos*.[216] These issues, combined with the analysis in the next section, explain why the Cyprus dispute is to be contrasted with other cases whereby peace was achieved without extensive restitution programmes.

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[213] Supra n 20.
[214] Supra n 185.
[215] Buyse, 'Home Sweet Home? Restitution in Post-Conflict Bosnia and Herzegovina', (2009) 27 No. 1 *Netherlands Quarterly of Human Rights* 9 at 18.
[216] Communication from the applicants' representative, 29/11/2013, available at: https://wcd.coe.int/ViewDoc.jsp?Ref=DH-DD(2013)1300&Language=lanFrench&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 last accessed 31 March 2014].

## 9. Peace without Restitution?

Property restitution remains controversial in international law. In addition to the financial hurdles and the practical complexities that restitution involves,[217] not everyone agrees on its desirability either as a tool for economic growth or restoration of the rule of law.[218] For instance, some argue that property restitution is not as important in light of other serious human rights violations which may have occurred under oppressive regimes.[219]

Following the territorial adjustments and population movements that occurred in Europe as a result of WWII, millions of individuals lost their properties and were forced to relocate. The problem re-surfaced with the collapse of communism when affected states were faced with the challenge of protecting their sovereign identity as well as dealing with past expropriations.

Experience however on how post-communist states dealt with restitution widely varies. It is noteworthy that no state restored property to every dispossessed.[220] In the Czech Republic for instance restitution was exempted for expropriation that took place pre-1948 or for property that belonged to Sudeten Germans.[221] This reflected the view, arguably questionable, that expropriations against those perceived to have been Nazi collaborators, were justified as collective punishment.[222] Similarly in Poland restitution of property which belonged to displaced Germans was denied through national legislation.[223] In Hungary, instead of restitution the state agreed to pay fixed rates in the form of coupons. Only properties with small market value were returned.[224] In Germany too expropriations during the Soviet control were exempted from restitution.[225]

Despite these considerations, states did try to implement, to a lesser or greater extent, restitution policies. Although restitution remains in many countries an open wound as evident from cases that reached the ECtHR,[226] this has not prevented them from achieving peace. It is nevertheless necessary to understand the legal framework in existence at the time of this dispossession, when human rights and the contemporary rules on armed force had just started to find express recognition in international conventional as well as customary law. Even though such rights are now widely recognised, problems remain relating to the non-retroactive character of treaties such as the ECHR, which make restitution of pre-ratification expropriation difficult to achieve.[227] Furthermore, such dispossession through population transfers and territorial adjustments was given effect

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[217] Leckie, 'Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework', *Legal and Protection Policy Research Series*, PPLA/2005/01, March 2005 at 12.
[218] Supra n 24 at 4.
[219] Heller and Serkin, 'Revaluing Restitution: From the Talmud to Postsocialism', (1999) 97 *Michigan Law Review* 1385 at 1403-04.
[220] Supra n 24 at 2.
[221] Supra n 219 at 1401.
[222] Ibid, at 1411; Bakar, 'Between Restitution and International Morality', (2001) 25 *Fordham International Law Journal* 46 at 51.
[223] *Preussische Treuhand GmbH & Co. KG a.A.v Poland* Application No 47550/06, Decision, 7 October 2008 at [38]-[40].
[224] Supra n 219 at 1402.
[225] See analysis in Section 3.
[226] Supra n 223.
[227] Ibid, at [52] and [57].

through peace treaties to mark the end of the war, such as the 1945 Potsdam Agreement.[228]

For these reasons, these examples need to be differentiated from the Cypriot cases which concern dispossession in continuing violation of post-WWII international norms, including the ECHR rights, and which took effect after the latter's ratification. Moreover, unlike the post-communism cases in which the ECtHR cast doubt as to which state was responsible for such expropriations,[229] Turkey bears sole responsibility for these violations. The ECtHR itself, drawing a line between these two sets of cases stressed that

> in the Loizidou case the inherent illegitimacy of measures stripping the applicant of her ownership rights derived from the fact that the expropriation laws in question could not be attributed legal validity for the purposes of the Convention as they emanated from an entity which was not recognised in international law as a State and whose annexation and administration of the territory concerned had no basis in international law. As a result, it could not be said that formal acts of expropriation were carried out.[230]

The case for restitution in a post-WWII context however becomes even more compelling in situations where displacement occurs on the basis of discriminatory laws.[231] Such laws, implemented in former Yugoslavia were regarded as an impediment to 'reconstruction and reconciliation.'[232] Hence, 'Return was … explicitly connected to peace'.[233] Similarly, in South Africa restitution was an integral part of the political solution and reconciliation.[234] Importantly, even if a potential future political settlement may include restitution this should not be used to deny restitution in cases before the ECtHR before such settlement has been agreed upon. Nor should a political solution concretize practices of ethnic cleansing given effect through denial of restitution.

In this light, the next session focuses on another aspect of the IPC which renders it ineffective, namely that of discrimination. It is argued in this regard that the ECtHR' s insistence on a political, as opposed to a legal, solution is problematic.

## 10. Non-Discrimination and the Immovable Property Commission

The IPC bases its decisions on bi-zonality and bi-communality. The ultimate purpose of these is to make territorial readjustments and prevent free settlement and return on the

[228] Ibid, at [32].
[229] Ibid, at [52] and [57].
[230] Ibid, at [61].
[231] Leckie and Huggins, *Conflict and Housing, Land and Property Rights: A Handbook on Issues, Frameworks, and Solutions* (Cambridge: Cambridge University Press, 2011) at 122.
[232] UN Sub-Commission on the Protection and Promotion of Human Rights, Resolution 1998/26 quoted in supra n 217 at 14.
[233] Supra n 215 at 16; supra n 201 at 612.
[234] Hurwitz, 'Restitution of Land Rights in Post-apartheid South Africa', (2001) *Journal of Local Government Law* 15 at 15 and 17.

basis of discriminatory, ethnic, racial and religious grounds.[235] Such policies violate both the ECHR and international humanitarian law as ethnic cleansing.[236] Although the ECtHR in *Demopoulos* seems to recognise that there exists a 'general policy to exclude Greek-Cypriots from their homes and properties' which did not rely 'on any objective and reasonable justification',[237] it did not examine the question of discrimination. It relied instead on its previous jurisprudence on the dispute in which no determination on discrimination was made.[238] Nevertheless, it is important to highlight that in those cases the ECtHR found violations of other fundamental rights, and this is why it did not consider it necessary to address the question of discrimination under article 14.[239] In *Demopoulos*, however, such examination was necessary not only in relation to whether a violation of article 14 existed, but also in relation to the effectiveness of the IPC as a remedy. The commission of war crimes and crimes against humanity through displacement and ethnic cleansing and racial division make such consideration necessary.

Whilst article 14 is read in conjunction with another Convention article, it can still be examined on its own even if the ECtHR has not found any other violation. In this instance, the ECtHR should have taken into consideration the discriminatory elements in the procedure before the IPC to determine that there was a breach of article 14 and that as a result the remedy was ineffective.[240]

Any interference with the right to peaceful enjoyment of possessions must also be proportionate and satisfy a legitimate aim.[241] On the one hand, proportionality is linked with the affected person's dignity. Refusal to return the property concerned causes a disproportionate harm.[242] On the other hand, the occupation of territory, forcible expulsion of civilians and dispossession on the basis of discrimination does not serve any legitimate aims. As stressed in *Dokic* it was 'a matter of principle' that such ethnic differentiation could not be 'objectively justified in a contemporary democratic society.'[243]

Whilst states enjoy some discretion in restricting the right to property, such discretion is not unfettered. The adoption of law 67/2005 does not by itself mean that Turkey has satisfied its duty to provide an effective remedy. This is because law must satisfy justice. According to Radbruch, such justice is fulfilled if it adheres to equality. In other words, laws that discriminate are not just.[244]

The ECtHR has a pivotal role to play in transitional cases. By providing an effective remedy to undo past injustices it ensures not only that practices in breach of fundamental rights cease, but also, importantly, that they are not repeated in the future. Preventing the displaced to return home and to reclaim their property has been used as a tool for

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[235] See similar land discriminatory practices against Australian aborigines. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas' (1990-1991) 13 No. 1 *Australian Yearbook of International Law* 1 at 27-28.
[236] Also see Allen, supra n 24 at 14.
[237] *Demopoulos*, supra n 3 at [140].
[238] Ibid, at [142].
[239] Loucaides, supra n 3 at 448-49.
[240] As in *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1979-80); 1 EHRR 252 at [9].
[241] *Dokic* v *Bosnia and Herzegovina* (2013); 57 EHRR 38 at [57].
[242] Allen, supra n 24 at 10.
[243] *Dokic*, supra n 241 .
[244] Allen, supra n 24 at 12.

territorial advances and discriminatory restrictions. The ECtHR, as Europe's principal human rights monitoring body, should ensure that such practices are no longer tolerated. Importantly, ECtHR decisions should comply with well established principles relating to the rights of the dispossessed.

## 11. Conclusion

Displacement due to armed conflict or foreign occupation is not a new phenomenon in international law. The deportation and transfer of large parts of population from one area to another has often been used as a tool of territorial acquisition or ethnic cleansing. However, displacement can no longer be ignored due to the grave consequences it brings to the affected people and its severe interference with fundamental rights. Hence, property restitution and the return of the displaced gain particular significance in restoring the rule of law and providing justice to the victims of past injustice.

This article has argued that the political nature of a dispute or the passage of time are not sufficient to erase the internationally protected rights of the displaced. This article has also argued that international bodies such as the ECtHR need to ensure that remedies set up unlawfully to shield and further human rights violations must not be accepted. Such remedies must be clearly distinguished from those whose purpose is to facilitate the daily routine of the affected population. The IPC is the product of unlawful use of armed force. Rather than ensuring cessation of the Turkish occupation of Cyprus and remedying the displacement of Greek-Cypriots, it aims to interfere in a permanent manner with the rights of the displaced and to legitimize the *status quo*. As such, it should not have been accepted by the ECtHR in *Demopoulos* as an effective remedy. Allowing the victim to have access to an impartial and independent court of law is of primary importance.[245] The ECtHR should therefore be able to accept as admissible individual complaints unless and in so far as 'domestic decision-makers have resumed their rightful position as the Convention's first-line defenders.'[246] The ECtHR's approach to distance the question of effectiveness of a remedy from its validity in international law is in the author's view problematic.

Furthermore, the existing hurdles on restitution must be lifted in order to enable the reinstatement of the international legal order.[247] According to the UNHCR, there cannot be 'sustainable peace and stability …. Against the background of unfulfilled desires for return; they will remain destabilising factors for generations to come…'.[248]

There is indeed nothing 'maximalistic'[249] in the idea of working for a settlement of the Cyprus problem that is founded on human rights and democratic principles and is free from discrimination. Where political and factual realities come into play, the rule of law

[245] See in this respect cases for restitution of Jewish property taken during WWII in Veraart, supra n 92 at 49.
[246] Helfer, supra n 56 at 149.
[247] Veraart, supra n 92 at 51; Das, 'Restoring Property Rights in the Aftermath of War' (2004) 53 *International and Comparative Law Quarterly* 429 at 429.
[248] Statement by the Deputy High Representative. Mr Andrew Bearpark, to the Humanitarian Issues Working Group, Geneva, 17 Dec 1997.
[249] Skoutaris, 'Case Comment: Building Transitional Justice Mechanisms Without a Peace Settlement: A Critical Appraisal of Recent Case Law of the Strasbourg Court on the Cyprus Issue', (2010) 35 No. 5 *European Law Review* 720 at 733.

must prevail. Turkey remains responsible for depriving displaced persons of their right to enjoy their property without any interference. It also retains full responsibility for preventing them from returning home, imposing discriminatory division in violation of international law.

The preceding analysis has shown that there exists a concrete system of protection of the displaced developed under both international humanitarian and human rights law. This system prohibits practices of ethnic cleansing and displacement. At the same time, it provides for the return of the displaced and the restitution of their property rights. The ECtHR in *Demopoulos* should have taken these factors into consideration in determining the effectiveness of the remedy provided by the IPC. Whilst restitution is provided under law 67/2005, there is no restitution in practice or as a matter of a general rule as evident from post-*Demopoulos* developments.

The decision of the ECtHR has serious legal ramifications on the rights to property restitution and to return home in cases of foreign occupation and it appears to be at variance with well established rules of international law.[250] Whilst appreciating the factors that underlay the ECtHR's reasoning, *Demopoulos* stands in the way of effective protection of the rights of IDPs in Cyprus and elsewhere and of restoration of legality. This is evident from subsequent cases that reached the ECtHR such as in *Meleagrou.* The ECtHR needs to take remedial action to fill the human-rights vacuum its decision in *Demopoulos* has left. The ECtHR is now called to demonstrate that it is indeed 'the world's most effective international human rights tribunal',[251] and that it substantially safeguards civil and political rights as it was mandated to do. In this regard, providing victims of serious wrongdoings with an impartial and effective forum in which to be heard and ensuring that corrective justice is done is the only way forward for respect of the rule of law and fundamental rights and freedoms.

[250] Sanger, supra n 164 at 7-9.
[251] Helfer, supra n 56 at 126.